(3)

No. 06-333

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

PHELPS DODGE CORPORATION,

Conditional Cross-Petitioner,

v.

SAN CARLOS APACHE TRIBE; STATE OF ARIZONA; GILA RIVER INDIAN COMMUNITY; ASARCO LLC; SAN CARLOS IRRIGATION AND DRAINAGE DISTRICT; CITY OF SAFFORD; GILA VALLEY IRRIGATION DISTRICT; FRANKLIN IRRIGATION DISTRICT; SALT RIVER PROJECT; CITY OF GOODYEAR; BHP COPPER INCORPORATED, AND UNITED STATES OF AMERICA,

Cross-Respondents.

On Petition For Writ Of Certiorari To The Arizona Supreme Court

BRIEF IN OPPOSITION OF CROSS-RESPONDENT ASARCO LLC

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QUESTION PRESENTED

ISSUE: Whether the Arizona Supreme Court erred in holding that a consent decree entered by the United States District Court for the District of Arizona, adjudicated only claims to water of the mainstem of the Gila River, and not claims to water of that river's tributaries.

CORPORATE DISCLOSURE STATEMENT

ASARCO LLC, a Delaware limited liability company, is wholly owned by Asarco Incorporated, a Delaware corporation. Asarco Incorporated is wholly owned by Americas Mining Corporation, a Delaware corporation. Americas Mining Corporation is wholly owned by Grupo Mexico, S.A. de C.V. Grupo Mexico, S.A. de C.V. is traded on the Mexican Stock Exchange. No stock of the other entities mentioned is publicly traded.

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STATEMENT OF THE CASE

ASARCO LLC ("ASARCO") incorporates by reference the statement of facts in part I of the primary opinion below, as well as the recitation of facts found in part III.B of that opinion. *In re General Adjudication of All Rights to Use Water in Gila River System & Source*, 212 Ariz. 64, 67-69, 72-76, 127 P.3d 882, 885-87, 890-94 (2006), *reconsideration denied*, 212 Ariz. 470, 134 P.3d 375 (2006).

ASARCO is the successor in interest to the water rights of Kennecott Copper Corporation, a party to the 1935 decree in *United States v. Gila Valley Irrig. Dist., et al.*, Petitioner's Supplemental Appendix in Docket No. 06-173 ("No. 06-173 Supp. App.") at 103 *et seq.* (the "Globe Equity Decree" or "Decree"). *See* 212 Ariz. at 75, 127 P.3d at 893. Kennecott was the successor in interest of the Nevada Consolidated Copper Company, which in turn succeeded to the interest of Ray Consolidated Copper Company. Decree, Art. III at 11, No. 06-173 Supp. App. at 123. ASARCO's decreed rights include the right to use water for industrial, municipal, domestic and related purposes. *Id.*, Art. IX(3) at 109, No. 06-173 Supp. App. at 221; *id.*, Art. V at 19, 20, 23, 26, 28, 31, 36, 52, 57, 58, No. 06-173 Supp. App. at 131, 132, 135, 138, 140, 143, 148, 164, 169, 170. They also include the right to use water for irrigation. *Id.*, Art. IX(4) at 109, No. 06-173 Supp. App. at 221; *id.*, Art. V at 58, 66, 72, No. 06-173 Supp. App. at 170, 178, 184; *id.*, Art. IX(5) at 110, No. 06-173 Supp. App. at 222.

ASARCO also possesses rights to tributaries of the Gila River, both as successor in interest to Kennecott and in its own right. For example, Kennecott owned rights to Mineral Creek, a tributary of the Gila River, at the time it entered into the Decree.

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION

The Arizona Supreme Court addressed at length and rejected each of the arguments advanced in the Cross-Petition, in part III.B of the principal opinion below. 212 Ariz. at 72-76, 127 P.3d at 890-94. In doing so, it analyzed the initial and amended complaints framing the pre-Decree litigation in *United States v. Gila Valley Irrig. Dist., et al.*, key provisions of the Decree, and the procedural history preceding that Decree. It considered relevant federal case law, the First and Second Restatements of Judgments, and treatise commentary. While ASARCO disagrees with the Supreme Court's interpretation of the Decree with respect to the San Carlos River, the Court's overall evaluation of the issue posed by the Cross-Petition was thorough and consistent with the law of the federal Courts of Appeals.[1]

A. The Arizona Supreme Court's Decision Is Consistent With The Case Law Of The Federal Courts And Other State Courts.

1. The Arizona Supreme Court Correctly Held that the Parties to the Globe Equity Decree Intended to Limit its Preclusive Effect by Generally Eliminating Tributary Claims from its Coverage.

The Cross-Petitioner's principal quarrel with the decision below is with its conclusion that the Globe Equity

[1] In this Brief, when ASARCO refers to exclusion of tributaries from the scope of the Decree, it refers to tributaries other than the San Carlos River. ASARCO reiterates its view that the natural flow of the San Carlos River was decreed explicitly to its predecessor in interest by Article IX(5) of the Decree at 110, No. 06-173 Supp. App. at 222.

court and parties intentionally crafted a consent decree that narrowed its geographic scope from that sought in the original Bill of Complaint to a Decree excluding the tributaries of the Gila River. According to the Cross-Petition, this limitation on the scope of preclusion could be accomplished only by an express statement of intent in the Decree, which the Cross-Petitioner finds lacking. *See* Cross-Petition at 21-28.

The Arizona Supreme Court methodically dismantled all of the Cross-Petitioner's arguments that the Decree is preclusive of the Globe Equity parties' claims to the Gila River's tributaries. 212 Ariz. at 72-76, 127 P.3d at 890-94. ASARCO will highlight here only a few of the reasons the Cross-Petition is not well-taken.

The Decree itself stated that its scope is restricted to the mainstem of the Gila River. Article V, for example, declared that "the Gila River is the stream from which the water called for under each of said rights [recognized by the Decree] is and may be diverted. . . ." Art. V at 12, No. 06-173 Supp. App. at 124. The Decree also confirmed the previous dismissal of numerous defendants (including the Cross-Petitioner) without prejudice because "their claims and rights, if any, were and are outside the scope of said suit as same was and is outlined and defined in the amended complaint herein," despite the fact that some of the defendants to be dismissed "had filed their answers setting up their claims and rights to the use of certain waters from some of the tributaries of the Gila River, and said answers were filed through mistake and a misunderstanding as to the scope of said cause as outlined and defined in plaintiff's said amended complaint." Art. III at 9, No. 06-173 Supp. App. at 121. *See also* ASARCO

LLC's Appendix ("App.") App. 1-3; App. 4-6; App. 7-10; App. 11-13; App. 14-15; App. 16-19; App. 20-21.[2]

Article XIII of the Decree enjoined the parties, their successors and assigns

> from asserting or claiming – as against any of the parties herein, their assigns or successors, or their rights as decreed herein – any right, title or interest in or to the waters of the Gila River, or any thereof, except the rights specified, determined and allowed by this decree, and each and all thereof are hereby perpetually restrained and enjoined from diverting, taking or interfering in any way with the waters of the Gila River or any part thereof, so as in any manner to prevent or interfere with the diversion, use or enjoyment of said waters of the Gila River or any part thereof, so as in any manner to prevent or interfere with the diversion, use or enjoyment of said waters by the owners of prior or superior rights therein as defined and established by this Decree. . . .

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[2] The 1932 stipulation filed by the Cross-Petitioner and the United States leading to the Cross-Petitioner's dismissal was even more explicit in explaining that the Globe Equity action no longer encompassed the tributaries. It recited:

> WHEREAS approximately forty others of the defendants herein, comprising the Morenci Water Company and various irrigators of parcels of land – like the said [Phelps Dodge] Corporation and [Arizona Copper] Company – are the claimants or owners of rights of diversion and/or use of water from the tributaries of the Gila River as distinguished from the main stream, and were made parties defendant herein through inadvertence and mistake, which mistake likewise is to be rectified by their separation from this cause and elimination as parties thereto. . . .

App. 8.

Art. XIII at 113, No. 06-173 Supp. App. at 225. The Decree only "defined and established" rights with points of diversion on the mainstem of the Gila River (*see generally* Art. V at 12-72, No. 06-173 Supp. App. at 124-84), and the injunction is restricted expressly to diversions from "the waters of the Gila River or any part thereof" that impermissibly interfere with those decreed rights.

The Cross-Petitioner would have this Court find that the Globe Equity parties, while consenting to dismissal of these defendants (again, including the Cross-Petitioner) without prejudice, thereby preserving their tributary claims for another day, nevertheless surrendered their own existing rights to the tributaries without even mentioning such an extraordinary act of self-sacrifice. Such an interpretation of the Globe Equity parties' unspoken intent is implausible in a region where water is scarce, and conflicts over water are noted for their intensity and persistence.

The Decree should be construed basically as a contract. *United States v. Gila Valley Irrig. Dist.*, 31 F.3d 1428, 1433 (9th Cir. 1994), *citing United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-37 (1975). Parties to a consent decree may limit its preclusive effect explicitly or implicitly. Section 26(1)(a) of the RESTATEMENT (SECOND) OF JUDGMENTS (1980) notes that claims may be reserved where the "parties have agreed in terms *or in effect* that the plaintiff may split his claim, or *the defendant has acquiesced therein. . . .*" (emphasis added). Comment *a* to § 26 states that the rule of preclusion is "not applicable where the defendant consents, in express words *or otherwise*, to the splitting of the claim." (emphasis added). If, as the Cross-Petitioner suggests, an express exclusion of tributary claims was a prerequisite to their preservation, then the RESTATEMENT'S alternative of reserving a claim "in effect" would be superfluous.

The federal courts have recognized that claims can be preserved in the absence of express agreement. *See, e.g.*, *Venuto v. Witco Corp.*, 117 F.3d 754, 759-60 (3d Cir. 1997); *United States v. Martell*, 887 F. Supp. 1183, 1191 (N.D. Ind. 1995). Even in *California v. Randtron*, 284 F.3d 969 (9th Cir. 2002), on which the Cross-Petitioner relies, the court considered not only the terms of the consent decree but also the district court's interpretation of that decree. *Id.* at 975.

The parties to a consent decree can acquiesce implicitly to preservation of claims. *See, e.g.*, *Pueschel v. United States*, 369 F.3d 345, 356 (4th Cir. 2004) (Federal Aviation Administration "in effect consented to splitting" of plaintiff's claims by representation made in motion for summary judgment in prior action); *Bankruptcy Estate of Lake Geneva Sugar Shack, Inc. v. General Star Indem. Co.*, 200 F.3d 479, 481, 485 (7th Cir. 2000) (party's refusal to consent to consolidation of claims acquiesced in – and in fact encouraged – splitting of claims). The Cross-Petitioner's stipulation that tributary claims were outside the Globe Equity court's jurisdiction was, at a minimum, acquiescence in that restriction in the scope of the litigation and resulting Decree.

The Cross-Petitioner's stipulation reflected the nature of the Globe Equity litigation. That action was a quasi in rem proceeding.[3] *See Brooks v. United States*, 119 F.2d 636,

[3] "A judgment *in rem* affects the interests of all persons in designated property. A judgment *quasi in rem* affects the interests of particular persons in designated property. The latter is of two types. In one the plaintiff is seeking to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons. In the other the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him." *Hanson v. Denckla*, 357 U.S. 235, 246 n.12

(Continued on following page)

640, 641 (9th Cir.), *cert. denied*, 313 U.S. 594 (1941). The res in Globe Equity was the mainstem of the Gila River within the geographical reach defined by the amended complaint. *See* 212 Ariz. at 73-74, 127 P.3d at 891-92; Cross-Petitioner's App. at 74. "If jurisdiction is based on the court's power over property within its territory, the action is called '*in rem*' or '*quasi in rem*.' The effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the court." *Shaffer v. Heitner*, 433 U.S. 186, 199 (1977) (footnote omitted). "Since a State is forbidden to enter a judgment attempting to bind a person over whom it has no jurisdiction, it has even less right to enter a judgment purporting to extinguish the interest of such a person in property over which the court has no jurisdiction." *Hanson v. Denckla*, 357 U.S. 235, 250 (1958) (footnote omitted).

The Globe Equity court's jurisdiction was limited to the mainstem of the Gila River within the designated reach. Art. III at 9, No. 06-173 Supp. App. at 121. Because the court's jurisdiction was quasi in rem and thus limited, it had no jurisdiction to adjudicate anyone's claims to water sources (i.e. the tributaries) outside that geographic jurisdiction. Numerous decisions recognize that preclusion cannot operate on claims as a result of the decision of a tribunal lacking jurisdiction over those claims. *See, e.g.*, *Carver v. Nall*, 172 F.3d 513, 516 (7th Cir. 1999); *Bio-Technology General Corp. v. Genentech, Inc.*, 80 F.3d

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(1958). In *Hanson*, this Court used the term "in rem" to include both in rem and quasi in rem proceedings. *Id. See Nevada v. United States*, 463 U.S. 110, 144 (1983) ("water adjudications are more in the nature of *in rem* proceedings"); *see also Rickey Land & Cattle Co. v. Miller & Lux*, 218 U.S. 258, 261-62 (1910).

1553, 1563 (Fed. Cir.), *cert. denied*, 519 U.S. 911 (1996); *Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491, 501-03 (5th Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989); *Paragon Serv., Inc. v. Hicks*, 843 F. Supp. 1077, 1080-81 (E.D. Va. 1994); *McSherry v. Giannuzzi*, 717 F. Supp. 238, 241 (S.D.N.Y.), *appeal denied*, 889 F.2d 1098 (Fed. Cir. 1989) (table). Application of preclusion would be even more unfair in Globe Equity, where the court declined to rule on claims to tributaries asserted by the Cross-Petitioner and other defendants dismissed without prejudice. *See* CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 4412 at 276-77 (2002).

2. Adjudication of Only a Portion of a River System Is Not Unique to the Gila River.

The fact that the Decree adjudicated the mainstem of the Gila River without affecting claims to the river's tributaries is not unique. The so-called Kent Decree, for example, purported to decree rights to the Salt River and its tributary, the Verde River, but only those rights appurtenant to lands located in the vicinity of Phoenix, Arizona. *See Taylor v. Tempe Irrig. Canal Co.*, 21 Ariz. 574, 577, 193 P. 12, 13-14 (1920). A subsequent effort to enlarge the Kent Decree to encompass unresolved claims to the Verde River for lands lying outside the Kent Decree's geographic extent was denied for failure to join affected landowners. *Hurley v. Abbott*, 259 F. Supp. 669, 669-70 (D. Ariz. 1966). *See also Provo River Water Users' Ass'n v. Morgan*, 857 P.2d 927, 935 (Utah 1993); *cf. In re Rules & Regulations Governing Use, Control, & Protection of Water Rights for Both Surface & Underground Water Located in Rio Grande & Conejos River Basins & Their Tributaries*, 674 P.2d 914, 927 (Colo. 1984) (Rio Grande Compact did

not include certain tributaries); *State ex rel. Thompson v. Lavery*, 49 P. 852, 853 (Or. 1897) ("adjudication that a proprietor has no right to appropriate the waters of the main stream does not necessarily determine that he has no right to any of the waters of the tributaries thereof"). The Arizona Supreme Court's decision broke no new ground.

B. The Cross-Petitioner Is Estopped To Assert That The Decree Precludes Claims To Tributaries Of The Gila River.

The Cross-Petitioner represents to this Court in its "Question Presented" that "the tributaries were within the geographic scope of the *Globe Equity* adjudication. . . ." Cross-Petition at i. The doctrine of judicial estoppel precludes the Cross-Petitioner from making that assertion before this Court in light of its own actions in securing dismissal without prejudice from the Globe Equity suit.

"'[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.'" *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001), *quoting Davis v. Wakelee*, 156 U.S. 680, 689 (1895). Several factors inform this rule known as judicial estoppel. This Court provided a non-exhaustive list of these factors in *New Hampshire*: 1) the party's later position must be clearly inconsistent with its earlier position; 2) whether the party succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and 3) whether the party seeking to assert an inconsistent position would

derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *New Hampshire*, 532 U.S. at 750-51.

The Cross-Petitioner succeeded in securing its dismissal from the Globe Equity suit by affirming to the court that the Cross-Petitioner and other defendants to be dismissed

> are the claimants or owners of rights of diversion and/or use of water from the tributaries of the Gila River as distinguished from the main stream, and were made parties defendant herein through inadvertence and mistake, which mistake likewise is to be rectified by their separation from this cause and elimination as parties thereto; .... all to the end that said Phelps Dodge Corporation and Arizona Copper Company, together with the other defendants last referred to, shall be as though they never had been named or made parties defendant herein.

App. 8-9. The Cross-Petitioner was dismissed without prejudice on this basis. App. 16-18; Art. III at 9, No. 06-173 Supp. App. at 121. Its dismissal was premised on the fact that claims to tributaries of the Gila River were beyond the scope of the litigation, precisely the opposite of the position it presses in its Cross-Petition. Were the Cross-Petitioner to succeed in this effort, it would secure an unfair advantage over those parties to the Decree who, at the time of the Decree, claimed rights to the tributaries of the Gila River as well as to the mainstem of the river. The Cross-Petitioner would have this Court rule that those who remained parties to the litigation and entered into the Decree thereby relinquished their rights to the tributaries, while the Cross-Petitioner retained its tributary claims by

virtue of having assured the Court that such claims were beyond the scope of the litigation. This outcome would be patently inequitable, and create the impression that either this Court or the Globe Equity court has been misled. Considerations of equity require that the Court deny the Cross-Petition.

C. The Cross-Petition Presents No Issues Warranting This Court's Attention.

This Court has emphasized that "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority" among the lower courts. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). The Court decides questions of public importance "in the context of meaningful litigation." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959). It does not do so in disputes "of importance merely to the litigants" that "did not present an issue of immediate public significance." *Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 78-79 n.2 (1955).

The ruling below turns on an interpretation of the Globe Equity Decree, a 71-year old consent decree with a defined – and limited – geographic scope, regardless of whether the Arizona Supreme Court's or the Cross-Petitioner's delineation of that scope is correct. A ruling by this Court would have little if any import beyond the watershed of the middle and upper Gila River, the reaches of the stream encompassed by the Decree, and beyond the factual setting presented by the Globe Equity litigation. This Court's review cannot therefore be justified

on the basis that its decision would have broad application on an issue of immediate public significance.

The Decree has been the subject of intensive analysis and enforcement by the originating District Court and the Court of Appeals for the Ninth Circuit over its lifetime. Resulting *published* opinions include *United States v. Gila Valley Irrig. Dist.*, 920 F. Supp. 1444 (D. Ariz. 1996), *aff'd*, 117 F.3d 425 (9th Cir. 1997); *United States v. Gila Valley Irrig. Dist.*, 804 F. Supp. 1 (D. Ariz. 1992), *aff'd in part and rev'd in part*, 31 F.3d 1428 (9th Cir. 1994); *United States v. Gila Valley Irrig. Dist.*, 961 F.2d 1432 (9th Cir. 1992); *United States v. Gila Valley Irrig. Dist.*, 454 F.2d 219 (9th Cir. 1972); *Brooks v. United States*, 119 F.2d 636 (9th Cir.), *cert. denied*, 313 U.S. 594 (1941); *Gila Valley Irrig. Dist. v. United States*, 118 F.2d 507 (9th Cir. 1941). There have been numerous unpublished rulings as well. Any interpretation of the Decree by this Court would have to be undertaken against the backdrop of this complex litigation history.

Finally, for the reasons set forth above and in the Arizona Supreme Court's own words, that Court's decision is consistent with established law. This Court's involvement is not required to resolve a conflict of opinion among the lower courts.

CONCLUSION

The Conditional Cross-Petition for Writ of Certiorari is without merit and should be denied.

Respectfully submitted this 7th day of December, 2006.

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Superior Court of Arizona
Maricopa County

Contested Case No. W1-203
In re the Water Rights of the
Gila River Indian Community

Doc. #W1-203-5689

3/31/98

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF ARIZONA

THE UNITED STATES OF AMERICA, Plaintiff, vs. GILA VALLEY IRRIGATION DISTRICT, ET AL, Defendants.	IN EQUITY NO. E-59-GLOBE STIPULATION FOR DISMISSAL OF CERTAIN PARTIES DEFENDANT.

It is stipulated by and between the United States of America, plaintiff herein, through its solicitor, Clifton Mathews, Esq., United States Attorney, and Messrs. Kibbey, Bennett, Gust, Smith and Rosenfeld, solicitors for those certain parties whose names are herein listed;

That the hereinafter named parties were made parties defendant in the above entitled action through inadvertence and mistake, and that their and each of their interests, if any, are outside the territorial scope of said cause as it was and is defined in the Amended Complaint, and that none of them are necessary parties defendant, and that their dismissal and elimination from said action will be to their best interests and promote the settlement

of [illegible] issues which the United States seeks to have determined in said cause.

That some of the parties have no interests whatever in said action.

It is further stipulated that some of said parties may have, through a clear mistaken view of the facts, filed an answer herein, and presented claims, which ought never to have been filed, and that said answers, where filed, should be dismissed from the records without prejudice.

It is also stipulated that an order of dismissal, without prejudice, may be made as to and against each of the following parties:

S. B. Blake; Cluff & Mitchell; Colvin-Jones Consolidated Ditch Co.; John H. Davidson; W. P. Ferris; Jose Gonzales; T. Hinton; Layton & Ison; James Layton; E. D. McEuen; Roy A. Martin; Ed Moody; J. C. Norton; George A. Olney; Asa Packard; N. E. Platt; W. E. Posy; S. A. Powell; Pursley & Nash; Mrs. Mary Reynolds; Bert E. Rose; Smithville Extension Canal Company; Cinaco Telles; E. L. Tidwell; Louis Voelckel; W. J. Walton; T. W. Wamslee; Estate of Webster, F.A. Webster, Administrator; Estate of J. H. Williams; B. D. Wilson; Young & Ridgway;

Dated this [Illegible] day of December, 1934.

/s/ Clifton Mathews
Clifton Mathews, Esq.,
United States Attorney,
Solicitor for the plaintiff.

/s/ Kibbey Bennett Gust
Smith & Rosenfeld
Kibbey, Bennett, Gust,
Smith and Rosenfeld,
Solicitors for the above
named defendants.

(Filed March 30, 1935)

Superior Court of Arizona
Maricopa County

Contested Case No. W1-206
In re the Preclusive Effect of the
Globe Equity No. 59 Decree on Specified Parties

Doc. #W1-206-200364

1/31/2000

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF ARIZONA

THE UNITED STATES OF AMERICA, Plaintiff, vs. GILA VALLEY IRRIGATION DISTRICT, ET AL, Defendants.	IN EQUITY NO. E-59-GLOBE STIPULATION FOR DISMISSAL OF CERTAIN PARTIES DEFENDANT.

It is stipulated by and between H. A. Elliott and A. R. Lynch, solicitors for the hereinafter named parties defendant, and Clifton Mathews, Esq., United States Attorney and solicitor for the plaintiff, that:

The hereinafter named parties were made defendants in the above entitled cause through inadvertence and mistake as to interest, and that they and none of them are necessary parties defendant.

That their and each of their interests are outside the territorial scope of said suit as it was and is defined in the Amended Complaint.

That their dismissal and elimination as parties will best serve their interests and the interests of those whose rights the United States seeks to have determined in said cause, and that it will promote the settlement of said issues.

That through a clear mistake as to the facts, each of said parties appeared and some of them filed an answer setting forth claims based upon said mistaken view of the facts. It is therefore agreed that said appearances and answers may be treated as dismissed without prejudice.

It is also agreed that the Court may make an order of dismissal without prejudice as to and against each of the following parties:

Bank of Duncan; D. E. Barlow; J. W. Becker; Billingsley Canal Company; R. T. Bishop; Harry H. Boyer; Burcher Ditch Company; Estate of W. C. Cheatham; Edward C. Cole; Consolidated Canal Company; J. H. T. Cosper; Cosper-Wilson Canal Company; Ethel M. Cunningham; E. C. DeMose; Double Circle Cattle Company; Thomas Edwards; Bonnie Elrage; Mangus Elrage; Mrs. Geo. J. Filleman; J. J. Filleman; Franklin Canal Company; Fred J. Fritz; Mrs. Katie Fritz; Furr & Blain; Harve K. Gatlin; Gila Ranch Company; Greenhorn Ditch Company; Greenhorn Irrigating Canal; County of Greenlee; O. C. Greenwell; Ole Hagan; William F. Hagan; S. P. Hale; Francelle Haywood; Mrs. Clara Hicks; County of Hidalgo; Hill Ditch; Francis M. Hodges; Lettie F. Hunt; M. J. Jensen; M. L. Jensen; D. L. Johnson; F. E. Johnson; R. S. Johnson; A. L. Jones; J. H. Jones, Sr., Estate; Martin & Pearson Ditch; Martin & Pearson Irrigating Canal Company; Arven Mortensen; T. J. Nations; G. O. Payne; C. V.

Peery; T. M. Peters; Dell M. Potter; Fred Powell; R. Richardson; Romney Brothers; Romney & Lunt; Rucker Ditch; School District No. 30; J. M. Smelley; A. F. Smith; The Estate of Spoon, Ira L. Spoon, Adm.; A. G. Stevenson; W. R. Stevenson; Sunset Irrigating Canal Company; D. H. Thompson; W. Plune Tibbets; H. P. Trainor; Virden Ward; Ward & Courtney Dam Company; T. M. Williamson; State of New Mexico.

Dated this 27th day of December, 1934.

H. A. Elliott by ARL
/s/ A. R. Lynch
H. A. Elliott and
A. R. Lynch, Solicitors
for the above named
defendants.

/s/ Clifton Mathews
Clifton Mathews, Esq.,
United States Attorney,
Solicitor for the plaintiff.

(Filed March 30, 1935)

App. 7

Superior Court of Arizona
Maricopa County

Contested Case No. W1-206
In re the Preclusive Effect of the Globe Equity No. 59 Decree on Specified Parties

Doc. #W1-206-200365

1/31/2000

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE DISTRICT OF ARIZONA

THE UNITED STATES OF AMERICA, Plaintiff, v. GILA VALLEY IRRIGATION DISTRICT, et al., Defendants.	GLOBE EQUITY NO. 59 STIPULATION

This stipulation, by and between the plaintiff herein and defendants Phelps Dodge Corporation and Arizona Copper Company (hereinafter, as a matter of convenience, referred to as the Corporation and the Company), doth witness:

THAT WHEREAS said Corporation and Company were named in this cause and the Amended Complaint as parties defendant herein through and by inadvertent mistake and error; each of them as to their claims and rights being outside and beyond the territorial scope of

said cause as same was and is explicitly defined and described in the Amended Complaint herein, and

WHEREAS the orderly alignment and conduct, or as the case be, settlement of said cause, requires that said mistake be rectified, and it further appears that it will be consistent with the best interests of said defendants, and of aid to plaintiff and the great number of true defendants in achieving an adequate determination herein of those claims and rights which are within the scope and intention of this suit, to provide for the separation therefrom of said Corporation and Company, and the elimination of each of them as a party defendant in this cause by way of an appropriate order of Court herein; said action to be without prejudice to them or either of them, or to any of the other parties in this cause, or to any claims or rights to water which said Corporation and Company, or either of them, or said other parties or any of them, now or hereafter may have, one or any number thereof against the other or others; and

WHEREAS approximately forty others of the defendants herein, comprising the Morenci Water Company and various irrigators of parcels of land – like the said Corporation and Company – are the claimants or owners of rights of diversion and/or use of water from the tributaries of the Gila River as distinguished from the main stream, and were made parties defendant herein through inadvertence and mistake, which mistake likewise is to be rectified by their separation from this cause and elimination as parties thereto; same to be arranged for by plaintiff and accomplished through an appropriate order of Court – it being understood that the assent of said Corporation and Company to this Stipulation, in the absence of a further agreement between

the parties thereto, is conditioned upon the successful and reasonably complete accomplishment of the above general program, and in particular upon the elimination as parties defendant, in the manner aforesaid, of the Morenci Water Company and of all (or such number as will be satisfactory to the Corporation and Company) of the claimants and/or users of water from the San Francisco River and its tributaries (including Chase Creek) who now are named as defendants herein;

NOW THEREFORE, in consideration of and subject to the conditions named in the premises, it is hereby mutually stipulated and agreed that this cause and the amended complaint herein shall be dismissed, without prejudice as above set out, as to defendants Phelps Dodge Corporation and Arizona Copper Company, and each of them; such dismissal to be accomplished by way of a motion or application by plaintiff, in due course and prior to the entry of the decree herein, for an order to that end, made upon due notice to the parties who should be charged therewith; it being understood that plaintiff, upon like notice to the parties, in its said application or motion, or by way of a separate one in conjunction therewith, likewise shall move for a dismissal as to the Morenci Water Company and said other claimants or owners of rights to water upon the tributaries of the Gila River; all to the end that said Phelps Dodge Corporation and Arizona Copper Company, together with the other defendants last referred to, shall be as though they never had been named or made parties defendant herein.

/s/ [Illegible]
Special Assistant to the
Attorney General, Solicitor
for Plaintiff.

/s/ [Illegible]
Solicitors for the Phelps
Dodge Corporation and
Arizona Copper Company.

Dated January 29, 1932.

(Filed March 30, 1935)

Superior Court of Arizona
Maricopa County

Contested Case No. W1-203
In re the Water Rights of the Gila River Indian Community

Doc. # W1-203-17181

3/24/1999

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE DISTRICT OF ARIZONA

THE UNITED STATES OF AMERICA, Plaintiff, v. GILA VALLEY IRRIGATION DISTRICT, et al. Defendants.	)	GLOBE EQUITY NO. 59 STIPULATION.

This stipulation, by and between the plaintiff herein and defendant Morenci Water Company (hereinafter, as a matter of convenience, referred to as the Company), doth witness:

THAT WHEREAS said Company was named in this cause and the Amended Complaint as a party defendant herein through and by inadvertent mistake and error; said Company as to its claims and rights being outside and beyond the territorial scope of said cause as same was and is explicitly defined and described in the Amended Compalint [sic] herein, and

WHEREAS the orderly alignment and conduct, or as the case be, settlement of said cause requires that said mistake be rectified, and it further appears that it will be consistent with the best interests of said defendant, and of aid to plaintiff and the great number of true defendants in achieving an adequate determination herein of those claims and rights which are within the scope and intention of this suit, to provide for the separation therefrom of said Company, and its elimination as a party defendant in this cuase [sic] by way of an appropriate order of Court herein; said action to be without prejudice to it, or to any of the other parties in this cause, or to any claims or rights to water which said Company, or said other parties or any of them, now or hereafter may have, one or any number thereof against the other or others; and

WHEREAS approximately forty others of the defendants herein, comprising the Phelps Dodge Corporation and Arizona Copper Company and various irrigators of parcels of land – like the said Company – are the claimants or owners of rights of diversion and/or use of water from the tributaries of the Gila River as distinguished from the main stream, and were made parties defendant herein through inadvertence and mistake, which mistake likewise is to be rectified by their separation from this cause and elimination as parties thereto; same to be arranged for by plaintiff and accomplished through an appropriate order of Court – it being understood that the assent of said Company to this Stipulation, in the absence of a further agreement between the parties thereto, is conditioned upon the successful and reasonably complete accomplishment of the above general program, and in particular upon the elimination as party defendant, in the manner aforesaid, of the Phelps Dodge Corporation and Arizona Copper Company and of all (or such number as

will be satisfactory to the Company) of the claimants and/or users of water from the Eagle River (a tributary of the Gila River) who now are named as defendants herein;

NOW THEREFORE, in consideration of and subject to the conditions named in the premises, it is hereby mutually stipulated and agreed that this cause and the amended complaint herein shall be dismissed, without prejudice as above set out, as to defendant Morenci Water Company; such dismissal to be accomplished by way of a motion or application by plaintiff, in due course and prior to the entry of the decree herein, for an order to that end, made upon due notice to the parties who should be charged therewith; it being understood that plaintiff, upon like notice to the parties, in its said application or motion, or by way of a separate one in conjunction therewith, likewise shall move for a dismissal as to the Phelps Dodge Corporation and Arizona Copper Company and said other claimants or owners of rights to water upon the tributaries of the Gila River; all to the end that said Morenci Water Company, together with the other defendants last referred to, shall be as though they never had been named or made parties defendant herein.

/s/ [Illegible]
Special Assistant to the Attorney General, Solicitor for Plaintiff.

/s/ [Illegible]
/s/ [Illegible]
/s/ [Illegible]
Solicitors for the Morenci Water Company

(Filed March 30, 1935)

Superior Court of Arizona
Maricopa County

Contested Case No. W1-206
In re the Preclusive Effect of the Globe Equity No. 59 Decree on Specified Parties

Doc. # W1-206-200366

1/31/2000

IN THE DISTRICT COURT OF THE UNITED STATES

IN AND FOR THE DISTRICT OF ARIZONA

THE UNITED STATES OF AMERICA, Plaintiff, vs. GILA VALLEY IRRIGATION DISTRICT, ET AL, Defendants.	)	IN EQUITY NO. E-59-GLOBE STIPULATION

WHEREAS, the Aztec Mutual Canal Company; James LeRoy McCarthy; Frank C. Ellwell; and Richard E. Geyler; were made parties to the above entitled cause through inadvertence and mistake, and

WHEREAS, they each filed answers herein, also through inadvertence and confusion as to their rights; and

WHEREAS, they are not necessary parties defendant herein, they are willing to be dismissed without prejudice and their answers be held as never having been filed.

Now therefore, it is hereby stipulated by and between the parties hereto through their solicitors of record: that the suit and the Amended Complaint may be dismissed as

against each of the foregoing defendants without prejudice and that their answers may be dismissed without prejudice as against them or any of the parties to this action.

Dated December 27th, 1934.

/s/ Clifton Mathews
Clifton Mathews, Esq.,
United States Attorney,
Solicitor for the plaintiff.

/s/ Chalmers Fennemore Nairn
Chalmers, Fennemore and Nairn, Solicitors for the defendants whose names are listed in the foregoing stipulation.

(Filed March 30, 1935)

Superior Court of Arizona
Maricopa County

Contested Case No. W1-206
In re the Preclusive Effect of the Globe Equity No. 59 Decree on Specified Parties

Doc. #W1-206-200367

1/31/2000

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF ARIZONA

THE UNITED STATES OF AMERICA, Plaintiff, vs. GILA VALLEY IRRIGATION DISTRICT, ET AL, Defendants.	IN EQUITY NO. E-59-GLOBE ORDER DISMISSING CERTAIN DEFENDANTS

This cause coming on to be heard upon motion of Clifton Mathews, Esq., solicitor for the plaintiff, requesting the dismissal of certain parties defendant from this action, for the reasons among others, that; the parties in said motion named and hereinafter named were made parties defendant, through inadvertence and mistake, and

That their, and each of their, interests, if any, in the issues involved in this action are outside the territorial scope of this suit as it was and is defined in the Amended Complaint, and

That said and each of such parties are not necessary parties defendant to this suit, and

That each of the said and hereinafter named parties have, through their attorneys, stipulated that they be dismissed as parties defendant.

The Court, being fully advised in the premises, finds that each and all of the hereinafter named parties are not necessary parties defendant herein, and accordingly it is ordered that those certain defendants hereinafter listed and each of them be and they are hereby dismissed as parties defendant in this cause without prejudice.

The parties to whom this order applies are:

S.B. Blake; Cluff & Mitchell; Colvin-Jones Consolidated Ditch Co.; John H. Davidson; W.P. Ferris; Jose Gonzales; T. Hinton; Layton & Ison; James Layton; E.D. McEuen; Roy A. Martin; Ed Moody; J.C. Norton; George A. Olney; Asa Packard; N.E. Platt; W.E. Posy; S.A. Powell; Pursley & Nash; Mrs. Mary Reynolds; Bert E. Rose; Smithville Extension Canal Company; Cinaco Telles; E.L. Tidwell; Louis Voelckel; W.J. Walton; T.W. Wamslee; Estate of Webster, F.A. Webster, Administrator; Estate of J.R. Williams; B.D. Wilson; Young & Ridgway;

Also:

Bank of Duncan; D.E. Barlow; J.W. Becker; Billingsley Canal Company; R.T. Bishop; Harry H. Boyer; Burcher Ditch Company; Estate of W.C. Cheatham; Edward C. Cole; Consolidated Canal Company; J.H.T. Cosper; Cosper-Wilson Canal Company; Ethel M. Cunningham; Z.C. DeMoss; Double Circle Cattle Company; Thomas Edwards; Bonnie Elrage; Mangus Elrage; Mrs. Geo. J. Filleman; J.J. Filleman; Franklin Canal Company; Fred J. Fritz; Mrs. Katie Fritz; Furr &

Blain; Harve X. Gatlin; Gila Ranch Company; Greenhorn Ditch Company; Greenhorn Irrigating Canal; County of Greenlee; O.C. Greenwell; Ole Hagan; William F. Hagan; S.P. Hale; Francolle Heywood; Mrs. Clara Hicks; County of Hidalgo; Hill Ditch; Francis M. Hodges; Lettie F. Hunt; M.J. Jensen; M.L. Jensen; D.L. Johnson; F.E. Johnson; R.S. Johnson; A.L. Jones; J.H. Jones, Sr., Estate; Martin & Pearson Ditch; Martin & Pearson Irrigating Canal Company; Arven Mortensen; T.J. Nations; G.O. Payne; C.V. Peery; T.M. Peters; Dell M. Potter; Fred Powell; R. Richardson; Romney Brothers; Romney & Lunt; Rucker Ditch; School District No. 30; J.M. Smelley; A.F. Smith; The Estate of Spoon, Ira L. Spoon, Adm.; A.G. Stevenson; W.R. Stevenson; Sunset Irrigating Canal Company; D.H. Thompson; W. Plune Tibbets; H.P. Trainor; Virden Ward; Ward & Courtney Dam Company; T.M. Williamson; State of New Mexico.

Also:

Phelps Dodge Corporation; Arizona Copper Company;

Also:

Morenci Water Company;

Also:

Aztec Mutual Canal Company; James LeRoy McCarthy; Richard E. Geyler; Frank C. Elwell.

It is further ordered that the answer of each of said defendants who may have filed one herein, be and the same is hereby dismissed without prejudice and shall stand as if never filed.

Dated this 30th day of March, 1935.

/s/ F.C. Jacobs
Judge of the United States District
Court, in and for the District of Arizona

(Filed March 30, 1935)

Superior Court of Arizona
Maricopa County

Contested Case No. W1-203
In re the Water Rights of the Gila River Indian Community

Doc. #W1-203-5688

3/31/98

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF ARIZONA

THE UNITED STATES OF AMERICA, Plaintiff, vs. GILA VALLEY IRRIGATION DISTRICT, ET AL, Defendants.	IN EQUITY NO. E-59-GLOBE ORDER DISMISSING CERTAIN DEFENDANTS

This cause coming on to be heard upon the motion of Clifton Mathews, Esq., United States Attorney, solicitor for the plaintiff, requesting the dismissal of certain defendants, from which, and the records, it appears the following named persons, to-wit:

> Castlio Ditch; Thomas Crabtree; Ed Elrage; Dale M. Garden; Jensen Brothers; J.B. Johns; F. Vernon Jones; William L. Keppler; Randall Lunt; Vernon Lunt; M.J. McClaren; Hugh McKeen; William Milligan; Alfred Mortenson; Nichols & Company; Tomas Ponce; Serano R. Sexton; Ernest D. Shade; C.M. Short; Frank Shriver; A.R. Snyder; S. Stewart; T.L. Stockton; J.A. Suydam; Luther T. Sweeting; Miss E.A. Swofford; O.F. Swofford; Bonnie Ulrage; J.F. Wardner; and W.M. Willis;

were made parties defendant through inadvertence and mistake, and that all but six of said persons have no interest and that as to those six, who claimed a right to the use of water from certain tributaries of the Gila River, they are outside the scope of this action as defined and outlined in the plaintiff's Amended Complaint; that they are not necessary parties hereto; that they and each of them through their solicitors of record have stipulated that they may be dismissed and their answers in this cause stand as never having been filed, and the Court, being fully advised in the premises, orders, upon the grounds and for the reasons aforesaid, that this suit and the Amended Complaint be and it is hereby dismissed as against each of them without prejudice.

* * *

Dated this 30th day of March, 1935.

/s/ F.C. Jacobs
Judge of the United States District Court, in and for the District of Arizona

(Filed March 30, 1935)